

New Section 106 Programmatic Agreement (2011)
Implementation White Paper

May 16, 2012 update

This White Paper provides guidance for implementing the 2011 Section 106 Programmatic Agreement (PA). The following information highlights significant changes in the “review and clearance” process. This paper updates the white paper shared during the March 2012 REC and EPM meetings.

Overview

The new 2011 Section 106 PA differs from the 2001 Section 106 PA in these ways:

- 1) The new 2011 PA delegates program delivery to ODOT on behalf of FHWA.
- 2) The 2011 PA is a *program level agreement* outlining how the Section 106 Program will be carried out. The 2001 PA focused on Minor Transportation Projects. In the 2011 PA, *minor projects* are listed under *Stipulation 5 Alternative Procedures*, which includes a streamlined section eliminating paperwork for a number of undertakings (see below for details).
- 3) The 2011 PA contains a more comprehensive list of activities that can be processed programmatically than the 2001 PA. All activities that were processed under the 2001 PA will fit within the 2011 PA.
- 4) In many cases, the 2011 PA requires less documentation than the 2001 PA requirements.
- 5) The 2011 PA identifies and documents consulting parties, including those beyond the tribes.
- 6) The 2011 PA does not exempt any FHWA projects from the Section 106 process. The PA provides for alternative procedures for compliance with the Section 106 process.

The 2001 PA was no longer in effect, upon the execution of the 2011 PA, on December 23, 2011.

What remains the same?

- ODOT Archaeologists are responsible for all Tribal consultation, will continue to meet with Tribes regularly, and will track project consultation on a spreadsheet.
- All clearance documentation will be processed through the Geo-Environmental Admin Office in Salem.
- We will retain our SHPO Liaisons to assist with processing clearances and permits.

How should you use the 2011 PA?

Stipulation 4 outlines the *Standard Review for Program Undertakings*. Within this section, Stipulation 4C (pg. 7) outlines the review for *No Historic Properties Affected*, as well as findings of no-adverse (4D) and adverse effect (4D, 4E). Stipulation 5 (pgs. 9-10) outline the *Alternative Procedures* for specific types of program undertakings. Stipulation 4C is to be used for all no-effect project undertakings that are not included in either List A or B under Stipulation 5. Projects with a No Historic Properties Affected finding, that are not on Stipulation 5, List A or B, will be cleared under 4C using a memo. This eliminates the need for Finding of Effect letters under No Historic Properties Affected. The cultural resources staff will notify the SHPO and Tribes of the undertaking, evaluate the project via scoping, surveys, etc, document using the memo format as shown in Exhibit 4 and then provide the REC with CE Closeout information.

There will continue to be times when archaeological field work is necessary and will require a Technical Report. While we are no longer required to submit “no effect” concurrence letters to SHPO, there is a cover letter which accompanies the Technical Report that gets submitted to SHPO by the Agency Archaeologist. Again, your Agency specialist will work with you on the requirements.

Stipulation 5 Alternative Procedures breaks out undertakings into List A and List B, similar to the 2001 PA. All projects under List A can be cleared using spreadsheet documentation (Exhibit 2). No memo is necessary and there is no 30 day Tribal review period. ***All projects under List A will be cleared in-house by ODOT Staff*** (this will require close coordination on Local Government projects).

The Spreadsheet will be maintained by the ODOT Cultural Resources Staff with Read-Only access for the RECs. The Spreadsheet is available at the following location:
[\scdata:\Admin_Correspondence_by_Key\Cultural_Resource_2011_PA_Tracking](#)

Projects under List B are cleared using Exhibit 4 (similar to the old memo process) and includes a 30 day Tribal review period. If a project does not fall under Stipulation 5 Lists A or B, it may qualify to be cleared using 4C, Finding of No Historic Properties Affected documented with the spreadsheet or a memo, with the exception of No Adverse Effects and Adverse Effects. The List B Memo now has a signature block for the Agency Specialist. The Agency Cultural Resources Specialist or qualified consultant (if this is a Local Agency Project) will determine if a project falls under 4C and can be cleared using a Memo or Spreadsheet; the decision will be based on the complexity, unique nature, or potential for public interest or controversy of the project. For example, the EV Charging Station Project would fall under 4C and be cleared using a PA Memo, while projects like climbing lanes with paving, or widening and realignment projects can be cleared using the Spreadsheet format.

Example CE Closeout Language:

For Stipulations	Example CE Closeout Language
2011 PA Stipulation 5, List A Undertakings	The Section 106 finding for this project is No Historic Properties Affected: Robert Hadlow cleared this project for the built environment by spreadsheet under Stipulation 5 List A.15 and A.16, by the 2011 Section 106 PA 02/01/12; Tobin Bottman cleared this project for archaeology by spreadsheet, Stipulation 5 List A.15, by the 2011 Section 106 PA, 02/13/12.
2011 PA Stipulation 5, List B Undertakings	The Section 106 finding for this project is No Historic Properties Affected: Robert Hadlow cleared this project for the built environment by PA memo, Stipulation 5 List B.2, by the 2011 Section 106 PA, 02/01/12; Tobin Bottman cleared this project for archaeology by the 2011 Section 106 PA memo, Stipulation 5 List B.2, 2011 agreement, 02/13/12.
2011 PA Stipulation 4C	The Section 106 finding for this project is No Historic Properties Affected: Robert Hadlow cleared this project for the built environment by PA memo, Stipulation 4C, 2011 agreement, 02/01/12; Tobin Bottman cleared this project for archaeology by PA memo, Stipulation 4C, 2011 agreement, 02/13/12.

Note: Tribal consultation information must always be included with the CE Closeout.

No Adverse and Adverse Effects (Pg 8, Stipulation 4D, 2nd Paragraph & Exhibit 3) will now be coordinated with a Single Finding of Effect letter. This will require coordination between the Built Environment and Archaeological staff. SHPO will have 21 days to review and respond instead of the typical 30 days.

Geotechnical Clearances (Pg. 13, Stipulation 6), will require Tribal notification however the Archaeologists will decide whether the activity falls under List A or B of Stipulation 5. Any work within a known site must be cleared by SHPO using Stipulation 4.

Table 1: Documentation Requirements and Tribal Review Timeframes under 2001 PA

2001 PA	Documentation	Tribal Review Timeframe**
Minor Transportation Projects Lists D & E	PA Memos	30 day
No Historic Properties Affected; No Affect; Adverse Effect	FOE to SHPO	30 day

Table 2: Documentation Requirements and Tribal Review Timeframes under 2011 PA

2011 PA	Documentation	Tribal Review Timeframe**	Note
Alternative Procedure List A (<i>Stipulation 5</i>)	Exhibit 2 Spreadsheet	Notification	Submitted to ACHP, FHWA and SHPO via Annual Report; NEPA documentation will reference List A and the corresponding Stipulation project type (number) of the 2011 PA
Alternative Procedure List B (<i>Stipulation 5</i>)	Exhibit 4 PA Memos	30 day	Submitted to ACHP, FHWA and SHPO via Annual Report; Provided with NEPA documentation
No Historic Properties Affected (<i>Stipulation 4C</i>)	Exhibit 2 Spreadsheet	Notification	Similar to E9 in 2001 PA, no more FOEs
No Adverse Effect (<i>Stipulation 4D</i>)	Report, DOEs & Exhibit 3 FOE	30 days	Exhibit 3 Single Section 106 Finding
Adverse Effect (<i>Stipulation 4E</i>)	Report, DOEs & Exhibit 3 FOE, and /or MOA or PA	30 day	Exhibit 3 Single Section 106 Finding
Geo-Technical (Stipulation 6)	Exhibit 2 Spreadsheet (List A) PA Memo (List B)	None (List A) 30 days (List B)	Work in known archy site may require an FOE

**Tribes will always be notified about pending projects. Tribal Review Timeframe references the formal Tribal Consultation timeframes as outlined in 36CFR800.

When must projects follow the 2011 PA?

Any Section 106 work that is initiated on or after December 23, 2011, will follow the 2011 PA process.

Projects that have completed technical Section 106 work under the 2001 PA, but have not yet received a NEPA approval from FHWA, will need to document how the project fits the 2011 Section 106 PA. ***This does not mean that any work previously completed needs to be “re-done”.*** The following section of this white paper provides guidance on how to appropriately document these projects.

Findings of No Historic Properties Affected. Project activities that fit within Stipulation 5, List A or List B; or Project Activities that fit within Stipulation 4C, use the following template language, modified to fit each specific project, in the CE closeout. Attach the PA memos that were completed prior to the execution of the 2011 PA.

For Stipulations	Example CE Closeout Language
2001 PA, List D or E, PA Memos	The Section 106 finding for this project is No Historic Properties Affected: Robert Hadlow cleared this project for the built environment by PA memo, Stipulation E.5, 2001 agreement, 02/01/12; Tobin Bottman cleared this project for archaeology by PA memo, Stipulation E.5, 2001 agreement, 02/12/12. The project activities fit under Stipulation 5, List A8 of the 2011 Section 106 PA.

To assist with the development of Closeout language Exhibit 1 illustrates the differences between the 2001 activities and the 2011 activities.

ODOT is working to develop a list of projects that were developed under the 2001 PA that do not fit the 2011 PA. ODOT and FHWA will reach agreement on which projects cannot fit within the 2011 PA and identify a Section 106 compliance strategy for those projects.